**Press release**

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**CMS European M&A Study 2011: Change from Buyer’s to Seller’s Market for Deals**

**The European M&A market is recovering and changing back from a buyer’s into a seller’s market. This is one of the core findings of the CMS European M&A Study 2011. Even though the standards for risk allocation have not returned to 2007 levels, there are clear indications that increased competition contributes to an overall greater willingness of buyers to take risks. The Study is another chapter in the successful CMS European M&A Studies series, which has seen volumes in 2009 and 2010.**

“The increase in transaction numbers is the most conspicuous indication of the recovery of the M&A market,” M&A expert Peter Huber, partner and head of the transactions team at CMS Reich-Rohrwig Hainz, explains. “However, in the allocation of contract risks there are more and more signs that a balance has been reached and the market is developing towards a seller’s market.” He points to clear indications that company acquisitions and sales will continue to grow also in 2011.

**Fewer Liability Caps, Shorter Limitation Periods**

2010 was a recovery year for M&A. Much of the prior year was dominated by the market’s reaction to the financial crisis of 2008, leaving many buy-side players with a cautious approach to acquisitions. There were many deals with an element of distress, motivated by anxious creditors or shareholders on the selling side. Risk allocation became distorted due to the state of the market. Buyers picked up some good bargains and it was plainly a buyer's market.

**The buyer's market during and immediately after the financial crisis was characterised by the following:**

* The proportion of deals with high liability caps imposed on the seller rose.
* There was a high proportion of transactions with very short time limitation periods for general warranties and a high proportion with long warranty periods for general warranties.
* Earn-out deals were slightly more popular than in the past.
* Price adjustment clauses linked to working capital were more often required by buyers.

**In contrast, the current survey by the M&A experts identified the following trends:**

* The proportion of deals with high liability caps is falling.
* Limitation periods for general warranties are getting shorter.
* The return to action of financial investors in 2010 has also quickened the pace of the M&A market.

**Overview of key conclusions of the CMS European M&A Study 2011:**

* **Purchase price adjustments** – there were fewer purchase price adjustment clauses in 2010, 35% compared with 48% in 2009.
* **Locked box mechanisms** – the greater activity of financial sellers heralded much greater use of locked box mechanisms in Continental Europe, particularly in the German-speaking countries.
* **Earn-outs** – earn-out periods became shorter, as demonstrated by 65% of such earn-outs being payable within 24 months, compared with 51% in 2009.
* **Timing of warranties** – a higher percentage of deals featured repetition of all warranties on closing, 67% compared with 60%.
* **De minimis and baskets** – slightly fewer deals had de minimis provisions. More deals had basket threshold provisions and still more deals featured recovery on an "excess only" basis, revealing perhaps a gradual movement towards US deal norms.
* **Liability caps** – the proportion of transactions where the liability cap imposed on the seller for warranty breaches exceeded 50% of the purchase price has declined when measured against the peak of the last two quarters of 2009.
* **Limitation periods** – the proportion of deals with general warranty limitation periods exceeding 24 months has generally flatlined at around 27% since its peak in the second quarter of 2009, and declined notably in the last quarter of 2010.
* **Arbitration** – there has been a decline in the use of arbitration as the dispute resolution mechanism instead of public courts, with just 32% of 2010 deals featuring an arbitration clause as against 40% in 2009.

**Marked Differences among Markets, Especially between Europe and the USA**

While these observations seem to signal an overall trend toward seller-friendly provisions in Europe generally, there are significant regional differences highlighted by the Study. In German-speaking countries, there was a notable increase of liability caps and decrease in liability caps of more than 50% of the purchase price, which is a return to the average of the three-year period between 2007-2009. Escrow accounts were more frequently used as a security for warranty claims and cartel clearances were the most likely pre-condition to closing.

In Central and Eastern Europe (CEE), earn-out deals were rare (only 8%) and non-compete clauses are much rarer when compared to elsewhere in Europe. Arbitration is also the main dispute resolution process – 76% compared with the European norm of 33% in 2010.

The Study also highlights significant cultural and regulatory differences between Europe and the United States. Chiefly, the comparison shows material adverse change (MAC) clauses are used in 80% of deals in the US compared with just 16% of deals in Europe. Basket thresholds for warranty claims are much more prevalent in the US, and the basis of recovery differs. Working capital adjustments continue to be by far the most frequently used criteria for purchase price adjustments in the US, and basket thresholds tend to be lower in the US with 89% being less than 1% of the purchase price compared with 49% in Europe.

Peter Huber comments, “The differences in local and regional market practices revealed by the Study show how important it is for foreign investors to be able to rely on the local expertise of experienced advisors.”

**Methodology of the Study**

The CMS European M&A Study 2011 is based on a thorough analysis of 1,000 transactions concluded between 2007 and 2010, roughly 300 of which stem from 2010. The data used in the Study are not publicly available but were derived from deals negotiated in camera in which CMS acted as an advisor to either the buyer or the seller. Comparable data from the USA were taken from the “Private Target Mergers & Acquisitions Deal Points Study 2009” of the American Bar Association’s Business Law Section.

The study breaks down its analysis into four European regions:

* **Benelux** (Belgium and the Netherlands)
* **Central and Eastern Europe** (Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, Ukraine)
* **German-speaking countries** (Austria, Germany, Switzerland)
* **Southern Europe** (Italy and Spain)
* **France** and the **United Kingdom** are presented as individual categories.

**CMS Number 1 for M&A Deals in Europe and CEE**

In 2010, CMS advised on approximately 300 transactions, which is a plus of 25 percent compared to 2009. CMS thus comes in first in the M&A rankings of both Bloomberg and mergermarket concerning the number of transactions handled in Europe and CEE. “The results of our study are unique and representative. In Europe, CMS alone is able to draw from such a rich data pool. And this is a direct result of our expertise in all relevant European markets, which has enabled us to create this Study unparalleled in Europe,” Peter Huber states.

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**About CMS Reich-Rohrwig Hainz**

CMS Reich-Rohrwig Hainz was founded in Vienna in 1970 and has since emerged as one of the leading specialists in all areas of commercial and labour law. Highly-specialized teams consisting of internationally experienced lawyers primarily provide services in the following fields of law: M&A, banking and finance, real estate, taxes, labour laws, IP and IT laws, and public procurement. The company operates offices in Vienna, Belgrade, Bratislava, Brussels, Kiev, Ljubljana, Sarajevo, Sofia and Zagreb. All CMS offices together offer clients a team of more than 500 experienced specialists in 13 offices across the CEE/SEE region.

CMS Reich-Rohrwig Hainz is one of the founding members of CMS, the association of leading European legal firms and tax consultants. At present, CMS operates a network consisting of more than 700 partners, 2,800 lawyers and tax consultants, and a total of 5,000 employees working on behalf of its clients. www.cms-rrh.com

**About CMS**

CMS aims to be recognised as the best European provider of legal and tax services. Clients say that what makes CMS special is a combination of three things:

Strong, trusted client relationships

High quality advice

Industry specialization

We combine deep local expertise and the most extensive presence in Europe with cross-border consistency and coordination.

CMS has a common culture and a shared heritage which make us distinctively European. CMS operates in 30 jurisdictions, with 54 offices in Western and Central Europe and beyond. CMS was established in 1999 and today comprises nine CMS firms, employing over 2,800 lawyers. CMS is headquartered in Frankfurt, Germany.

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